No. 86-962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN HUTCHINSON, ET AL.,
Petitioners,

v.

MARGARET MILLER, ET AL.,
Respondents.

TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal courts are available to defeated candidates seeking to recover damages under 42 U.S.C. § 1983 based upon an intentional fraudulent conspiracy to alter the outcome of an election.

PARTIES TO THE ACTION

A list of all parties to the proceeding in the court below is found at page 1a of the Appendix.

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Petitioners, John Hutchinson, William Reese, and Leonard Underwood, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on August 7, 1986.

OPINION BELOW

The Order of The United States Court of Appeals for the Fourth Circuit was entered on August 7, 1986, and appears in the Appendix.

JURISDICTION

The Order of the Court of Appeals was entered on August 7, 1986. A Petition for Rehearing In Banc was

denied on September 5, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 CIVIL ACTION FOR DEPRIVATION OF RIGHTS

> Every person who, under color of any statute, ordinance, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to he subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The petitioners in this case were defeated candidates in the 1980 general election in West Virginia. John Hutchinson was the incumbent democratic candidate seeking re-election to the U.S. House of Representatives. William Reese was the democratic candidate seeking the office of Kanawha County Commissioner. Leonard Underwood was a democratic candidate seeking election to the West Virginia House of Delegates.

On February 4, 1983 petitioners filed a three count complaint in the U. S. District court for the southern District of West Virginia. The complaint alleged that the defendants conspired to alter the results of the election by means of a fraudulent manipulation of the computer used to tabulate the votes. Count I was based upon 42 U.S.C. § 1983, since several of the co-conspirators were public officials. Count II was based upon West Virginia State

common law conspiracy. Count III was an action based upon 18 U.S.C. § 1961 et seq. (RICO).

After several defendants were dismissed either on motion to dismiss or summary judgment, the case proceeded to trial on April 10, 1985. At the close of petitioners' case in chief the District Court granted a directed verdict in favor of all remaining defendants. The District Court ruled that plaintiffs had failed to prove a conspiracy or that they would have won the election in the absence of the alleged conspiracy. The question presented to this Court, namely, whether the plaintiffs were entitled to bring their claim for damages in federal court, was not addressed by the District Court.

The decision of the District Court was affirmed by the United States Court of Appeals for the Fourth Circuit on August 7, 1986. Petitioners' Petition for a Rehearing In Banc was denied on September 5, 1986. The Fourth Circuit did not affirm the decision below upon the factual contention, but rather ruled that Federal Courts are not available to defeated candidates seeking damages under any factual situation.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS IN CONFLICT WITH SEVERAL DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The constitutional right to participate in a fundamentally fair election has been characterized by this Court as the most basic and fundamental right of all, all others being illusory if such right is undermined. *Wesberry v. Sanders,* 376 U.S. 1 (1964). Where such rights are at stake the need for uniformity among the circuits is compelling. The remedy available to a litigant deprived of the right to participate in a fundamentally fair election should not depend upon whether the election takes place in West

Virginia or Indiana or Chicago, but rather should be uniform throughout the land.

The United States Court of Appeals for the Seventh Circuit has addressed several cases in which candidates were seeking damages. In *Shakman v. Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970), a defeated candidate brought a § 1983 action seeking equitable relief and damages. The court found that dismissal of the complaint was improper and that plaintiffs had alleged a proper case under § 1983. Upon remand to the District court, plaintiffs dismissed their claims for monetary damages in exchange for a consent judgment affording equitable relief. *Shakman v. Democratic Organization of Cook County*, 481 F. Supp. 1315 (N.D. Ill. 1979).

In *Bodine v. Elkart County Election Board*, 788 F.2d 1270 (7th Cir. 1986) plaintiffs who were losing candidates sought monetary damages under § 1983. The Court found no intentional conduct, therefore, no constitutional violation sufficient to satisfy § 1983 requirements. The Court however suggested that had any allegation of intentional manipulation by the defendants been present a valid claim would have been stated.

Finally, in *Lizak v. Kusper*, 399 F. Supp. 1270 (N.D. Ill. 1974) Aff'd. 506 F.2d 1405 (7th Cir. 1974), a candidate sought equitable relief and damages under § 1983 for denial of his petition to be listed as a committeeman. The court when discussing the issue of mootness stated that although the election was over the case was not moot since the plaintiffs sought damages.

The aforementioned cases clearly illustrate that the Seventh Circuit allows defeated candidates to seek damages in federal courts. In the case at bar the Fourth Circuit has denied this right. Such conflict cries out for

resolution by this Court given the paramount importance of the right involved.

2. THE DECISION BELOW REPRESENTS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO SERIOUS THAT THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION IS REQUIRED.

To obtain a review of a decision below a petitioner must show that the decision not only is wrong, but also that it carries with it serious and dangerous repercussions. This case satisfies those criteria. The decision below would deny a federal forum to a defeated candidate even in the presence of a signed confession of fraud on the part of conspirators. The petitioners presented eyewitness testimony at trial of several of the defendants manipulating the vote total during the vote tabulation. In addition, petitioners introduced a document prepared by one of the defendants which listed the exact final vote totals for certain precincts. Such document was in existence before all of the votes were even counted. Despite these facts the plaintiffs are denied a remedy. Such a situation should shock the conscience of any reasonable observer.

It should be noted that this case involves more than "election irregularities." Federal courts have long distinguished between such irregularities and intentional conduct designed to subvert the election process, finding in all cases a federally actionable constitutional deprivation in the latter. *Duncan v. Poythress,* 657 F.2d 691 (5th Cir. 1981) exhaustively reviews the law regarding such distinction. This distinction is discussed not only for purposes of determining a constitutional deprivation sufficient to satisfy § 1983, but also in terms of the question of federal intervention in state elections (political question).

The decision below rests in part upon the assumption that alternative remedies were available to the petition-

ers. To the contrary, such alternative remedies were time-barred because of the secretive nature of the fraudulent conspiracy. Such remedies such as afforded by the Federal Contested Elections Act, 2 U.S.C. § 382-396 require the filing of an election contest within 30 days after the election has been certified. Similarly remedies provided by the W. Va Code § 3-7-4 require notice in writing within 21 days after the election is held.

The decision of the Fourth Circuit therefore allows a defendant to fix an election by trickery and fraud and to avoid any civil liability so long as the fraud can be concealed for the requisite number of days within which a defeated candidate must file an election contest. Surely a rule of law which allows conspirators to profit by their own misdeeds cannot be condoned by the federal judiciary.

In summary, this case requires review by this Court due to the importance of the right involved and the drastic unacceptable effect the decision below has upon the protection of that right, namely the right to a fundamentally fair election process.

CONCLUSION

The decision below is in conflict with the decisions of the United States Court of Appeals for the Seventh Circuit. The decision also seriously impairs the right of candidates to a fundamentally fair election process. For those equally compelling reasons petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

United States Court of Appeals for the Fourth Circuit

No. 85-1548

John Hutchinson; William Reese; Leonard Underwood,
Appellants,

versus

Margaret D. Miller, individually and as Clerk of the County Commission of Kanawha County, West Virginia; David Michael Staton; Steven L. Miller; James E. Roark, individually and as Prosecuting Attorney of Kanawha County, West Virginia; John A. Cavacini, Jr.; Computer Elections Systems, Inc., a foreign corporation; Bernard H. Meadows; Clayton Spangler; Keith Ervin Long; Carl Clough; William E. Biebel; Darlene Dotson; Carolyn Critchfield, individually and as Voter Registrar of Kanawha County, West Virginia; Ann Carroll, individually and as Chief Deputy of the County Commission of Kanawha County, West Virginia,

Appellees,

and

Cherrie Lloyd,

Defendant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Charles H. Haden, II, Chief District Judge. (C/A 83-2108).

Argued: March 3, 1986 *Decided: August 7, 1986*

Before PHILLIPS and WILKINSON, Circuit Judges, and GORDON, Senior United States District Judge

for the Middle District of North Carolina, sitting by designation.

John E. Sutter (Ashcraft & Gerel on brief) and John R. Mitchell for Appellants; John F. Wood, Jr., for Appellees Margaret D. Miller and Steven L. Miller; Henry R. Glass, III (Chester Lovett; Lovett & Cooper on brief) for Appellee John A. Cavacini, Jr.; Larry A. Winter (David D. Johnson, III; Spilman, Thomas, Battle & Klostermeyer on brief) for Appellees Computer Election Systems, Inc., Irvine Keith Long, Cherrie Lloyd, Carl Clough and William Biebel; (W. E. Mohler on brief) for Appellee David M. Staton; (James B. McIntyre on brief) for Appellee James E. Roark; (Jack W. DeBolt on brief) for Appellee Bernard Meadows; (Michael R. Cline on brief) for Appellees Clayton Spangler, Darlene Dotson, Carolyn Critchfield and Anne Carroll.

WILKINSON, Circuit Judge:

Plaintiffs are three unsuccessful candidates for public office who seek to recover approximately $9 million in damages under 42 U.S.C. § 1983, 18 U.S.C. § 1964 (Racketeer Influenced and Corrupt Organizations Act — RICO), and the common law of West Virginia, for alleged irregularities in the 1980 general election. The district court granted motions to dismiss, summary judgment, or directed verdicts in favor of all defendants, various election officials and those alleged to have conspired with them to fix the election. The court found plaintiffs had failed to prove the existence of a conspiracy, on which their case depended, or to show a fundamentally unfair election amounting to a constitutional deprivation.

We conclude that federal courts are not available for awards of damages to defeated candidates. Requests for equitable intervention into factual disputes over the conduct of elections, which raise many of the same

concerns as those presented by this damages action, are unavailing save in rare and extraordinary circumstances. We need not consider, however, whether the present case presents such circumstances, for plaintiffs seek no equitable relief. Because we are convinced that damages are unavailable in any event, we affirm the district court's dismissal of this action.

Our Constitution does not contemplate that the federal judiciary routinely will pass judgment on particular elections for federal, state or local office. The conduct of elections is instead a matter committed primarily to the control of states, and legislative bodies are traditionally the final judges of their own membership. The legitimacy of democratic politics would be compromised if the results of elections were regularly to be rehashed in federal court. Federal courts, of course, have actively guarded the electoral process from class-based discrimination and restrictive state election laws. This suit, however, asks us to consider the award of damages for election irregularities that neither disenfranchised a class of voters nor impugned state and federal procedures for the proper conduct of elections. In this essentially factual dispute, we defer to those primarily responsible for elections and we refuse to authorize yet another avenue for those disgruntled with the political process to keep the contest alive in the courtroom.

I.

Plaintiffs were Democratic candidates in the 1980 general election in West Virginia. John Hutchinson sought re-election to the United States House of Representatives in the Third Congressional District of West Virginia. This district included Kanawha and Boone Counties — where the disputed elections occurred — as well as twelve other counties. Plaintiff Leonard Underwood was the incumbent delegate to the state house

from Kanawha County, and plaintiff William Reese sought election as a County Commissioner for Kanawha County. Hutchinson and Reese were defeated by wide margins, while Underwood's loss was a narrow one.

Underwood requested a recount of all computer punchcard ballots cast in the election. When the Kanawha County Commission denied this request, Underwood sought a writ of mandamus in the Circuit Court of Kanawha County to compel a hand count of ballots. That action was dismissed, and a similar attempt before the state Supreme Court was found to be time barred. *State ex rel. Underwood v. Silverstein,* 278 S.E.2d 886 (W.Va. 1981). Hutchinson filed a formal election complaint with the United States Attorney in January, 1981. The resolution of that complaint is not revealed in the record, but apparently was not satisfactory to Hutchinson. Plaintiffs filed their original complaint in this suit in February, 1983.

As amended, the complaint in essence charges that the election night totals were pre-determined by defendants, who then conspired to cover up their activities. Named as defendants in the suit were both local officials and private citizens alleged to have acted in concert with those officials. The officials included Margaret Miller, Clerk of the County Commission of Kanawha County; Carolyn Critchfield, Ann Carroll, Darlene Dotson and Clayton Spangler, employees in the clerk's office; James Roark, the Prosecuting Attorney of Kanawha County in 1980; and Bernard Meadows, employed by the Clerk of the County Commission of Boone County. Private citizens named as defendants included Steven Miller, husband of Margaret Miller; David Staton, the successful Congressional candidate in the 1980 election; and John Cavacini, who in 1980 was associated with the campaign of Governor John D. Rockefeller, IV. Finally, plaintiffs sued Computer Election Systems, Inc. (CES), which provided computer

vote tabulating systems in Kanawha County, and four employees of CES — Keith Long, Carl Clough, Cherrie Lloyd, and William Biebel.

Plaintiffs allege that a conspiracy among the defendants began as early as January, 1979, when Kanawha County Commissioners considered the use of electronic voting equipment. They suggest that the Millers' support for the CES system and their role in the bidding process reveals the genesis of a scheme to fix the 1980 election. This purported scheme continued as CES employees helped county officials prepare for the use of CES equipment in the November election. Defendants, by contrast, describe the selection and preparation of CES equipment as legitimate and lawful activity designed to assist them in the efficient conduct of the election.

The CES system provided the county with electronic punch card vote tabulation, in which voters indicated their choices on computer punch cards. After polls were closed, these cards were transported to countywide tabulation centers in locked and sealed ballot boxes. The ballots were removed by teams of workers, who arranged them for feeding into the computer and noted in log books the time when ballot boxes were opened. Plaintiffs cite as evidence of election fraud the fact that the log shows one box was opened after the computer tabulation was printed out.

Plaintiffs' main allegations focus on events at the central tabulation center for Kanawha County. They rely largely on the testimony of Walter Price, incumbent candidate for the House of Delegates who was at the center on election night. Price testified that he observed Margaret Miller manipulating computer toggle switches during the election count, purportedly in an attempt to alter vote counts. He saw an "unknown gentleman" — whom plaintiffs identify as Carl Clough — placing a phone receiver into his briefcase. Plaintiffs suggest that this

activity is consistent with the use of a portable modem, perhaps in an effort to change vote totals. Price also testified that Stephen Miller took computer cards from his coat pocket and gave them to his wife, who allegedly fed the cards into the computer.

Finally, plaintiffs assert that numerous irregularities occurred after the election, including improper handling of the ballots and release of exact returns prior to the canvass, and destruction of ballots that violated the terms of W. Va. Code § 3-6-9. Plaintiffs make similar, though less detailed, allegations with respect to the election process in Boone County.

The district court made numerous rulings that narrowed the scope of this litigation. After ordering a complaint with more detailed allegations, the court found the amended complaint barely adequate to survive a motion to dismiss, except as to defendant Lloyd.[1] The court also held that plaintiffs' action came within the two-year limitations period because it alleged a conspiracy with wrongful acts as late as February 8, 1981. This holding, however, limited plaintiffs' case to the conspiracy and removed individual acts of defendants from the litigation.

After discovery, the court granted summary judgment in favor of defendant Cavacini, alleged to have had possession of unauthorized election returns. It also found

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[1] Lloyd asserts that plaintiffs' appeal of her dismissal is not timely under Fed. R. App. P. 4. This contention is incorrect. Under Fed. R. Civ. P. 54(b), a ruling adjudicating "fewer than all the claims or the rights and liabilities of fewer than all the parties" is not final absent "express determination that there is no just reason for delay and . . . an express direction for the entry of judgment." The court here made no such determination, and therefore the timeliness of the appeal as to defendant Lloyd is measured by the date of entry of final judgment resolving all issues as to all parties. *See, Robinson v. Parke-Davis & Co.*, 685 F.2d 912 (4th Cir. 1982).

the allegations of a Boone County conspiracy to be time barred, and accordingly granted summary judgment as to defendants Beibel and Meadows.[2]

The court considered motions for directed verdicts at the close of plaintiffs' case. It found that plaintiffs' claims failed for several reasons. The court held that plaintiffs had failed to prove a conspiracy, noting that the only evidence the election was rigged was "purely speculative . . . mere suspicion." It also found that plaintiffs Reese and Hutchinson had not shown that they were harmed by the alleged actions; there was no evidence that their large losses would have been victories in the absence of the alleged conspiracy. Further, finding only "mere election irregularities" and no evidence to suggest that the election was fundamentally unfair, the court held that plaintiffs had failed to prove a deprivation of a constitutional right essential to a § 1983 action. Finally, the court dismissed plaintiffs' claims under RICO, finding "absolutely no proof" that would allow it to consider the claim.

II.

Though our disposition of this dispute rests on the view that damages are unavailable to defeated candidates as a method of post-election relief, we are guided by an awareness of the broader context in which this suit arises. The plaintiffs ask us to arbitrate what is essentially a political dispute over the results of an election. We find it useful, for proper understanding of this case, to discuss the structural characteristics and mechanisms for review of disputed elections. This examination reveals both the proper sphere and the limits of judicial oversight of controversies in the electoral process.

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[2] Plaintiffs appeal the dismissal of Lloyd and the summary judgment in favor of Biebel, Meadows and Cavacino as improperly granted. Because we hold that this action may not be maintained under any circumstances, we need not consider the specific issues raised by these judgments.

As in any suit under § 1983 the first inquiry is "whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" *Baker v. McCollan*, 443 U.S. 137, 140 (1979).[3] In their complaint, plaintiffs alleged that defendants deprived them of "their constitutionally protected right to participate fully and fairly in the electoral process," and "their constitutional right to vote or receive votes," and their Fifth Amendment right to hold property, in this case public office. The district court found that plaintiffs proceeded at trial as "defeated or disenfranchised candidate[s] rather than as . . . disenfranchised voter[s]." Thus, plaintiffs essentially assert that they have been deprived of their "right to candidacy."

Courts have recognized that some restrictions on political candidates violate the Constitution because of their derivative effect on the right to vote. *See e.g., Anderson v. Celebrezze*, 460 U.S. 780, 786-88 (1983); *Clements v. Fashing*, 457 U.S. 957, 962-64 (1982); *Bullock v. Carter*, 405 U.S. 134, 142-44 (1972); *cf., Snowden v. Hughes*, 321 U.S. 1, 7 (1944). We assume, without deciding, that plaintiffs have sufficiently alleged a deprivation of constitutional rights to meet the basic requirements of a 1983 cause of action. That assumption, however, cannot end the matter. As Judge Rubin has noted for the Fifth Circuit: "constitutional decision must not be confined merely to the logical development of the philosophy of prior decisions unfettered by other considerations. The functional structure embodied in the Constitution, the nature of the federal court system, and

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[3] Though we speak here in terms of § 1983, our discussion applies as well to the RICO and common law counts. Our review of the limited role of federal courts does not depend on the specific theory under which a particular suit is brought, but rather upon the institutional structure established by the constitution and administered through other state and federal remedies.

the limitations inherent in the concepts both of limited federal jurisdiction and of the remedy afforded by section 1983 must all be fully attended." *Gamza v. Aguirre*, 619 F.2d 449, 452 (5th Cir. 1980). The functional allocations and structural mandates of our Constitution lead us to conclude, like the court in *Gamza* that this complaint must be dismissed.

We first acknowledge and affirm the significant duty of federal courts to preserve constitutional rights in the electoral process. Our role, however, primarily addresses the general application of laws and procedures, not the particulars of election disputes. Federal courts have, for example, invalidated class-based restrictions of the right to vote. *See, eg., Dunn v. Blumstein*, 405 U.S. 330 (1972) (durational residence requirement); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (poll tax); *Carrington v. Rash*, 380 U.S. 89 (1965) (restriction on voting rights of servicemen); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967). The dilution of votes through malapportionment has also been a major concern of the federal judiciary. *See e.g., Avery v. Midland County*, 390 U.S. 474 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964). Courts have also acted to further the congressional mandate, as expressed in the Voting Rights Act, 42 U.S.C. § 1971 *et seq.*, that race shall not affect the right to vote. *See, e.g., Rome v. United States*, 446 U.S. 156 (1980); *Perkins v. Matthews*, 400 U.S. 379 (1971). Intervention for reasons other than racial discrimination "has tended, for the most part, to be limited to striking down state laws or rules of general application which improperly restrict or constrict the franchise" or otherwise burden the exercise of political rights. *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978). *See e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Hendon v. North Carolina State Board of Elections*, 710 F.2d 177 (4th

Cir. 1983). By these means, federal courts have assumed an active role in protecting against dilution of the fundamental right to vote and the denial of this right through class disenfranchisement.

By contrast, "[c]ircuit courts have uniformly declined to endorse action under § 1983 with respect to garden variety election irregularities." *Griffin v. Burns*, 570 F.2d at 1076. *See, e.g., Welch v. McKenzie*, 765 F.2d 1311 (5th Cir. 1985); *Gamza v. Aguirre*, 619 F.2d 449 (5th Cir. 1980); *Hennings v. Grafton*, 523 F.2d 861 (7th Cir. 1975); *Pettengill v. Putnam County R-1 School District*, 472 F.2d 121 (8th Cir. 1973); *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970). These courts, mainly considering disputes involving state elections, have declined to interfere because of the constitutional recognition that "states are primarily responsible for their own elections," *Welch*, 765 F.2d at 1317, and that alternative remedies are adequate to guarantee the integrity of the democratic process. *See, e.g., Powell*, 436 F.2d at 88. The discussion of those alternative means of resolving electoral disputes is the focus of the following section.

III.

We note initially that the constitution anticipates that the electoral process is to be largely controlled by the states and reviewed by the legislature. This control reaches elections for federal and state office. Article I, sec. 4, cl. 1, grants to the states the power to prescribe, subject to Congressional preemption, the "Times, Places and Manner of holding Elections for Senators and Representatives." In addition, states undoubtedly retain primary authority "to regulate the elections of their own officials." *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (opinion of Black, J.).

Where state procedures produce contested results, the Constitution dictates that, for congressional elections, "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." Art. I, Sec. 5, cl. 1. The House accordingly has the authority "to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review." *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929). *See also Roudebush v. Hartke*, 405 U.S. 15, 19 (1972); *McIntyre v. Fallahay*, 766 F.2d 1078 (7th Cir. 1985). This plenary power is paralleled at the state level by the power of the West Virginia legislature to review the elections of its own members. *See generally*, W. Va. Code §§ 3-7-4,5. Contests for county offices, such as that of plaintiff Reese, are resolved by county courts. W. Va. Code § 3-7-6.

We thus proceed. with awareness that the resolution of particular electoral disputes has been primarily committed to others in our system. The express delegation to Congress and the states of shared responsibility for the legitimation of electoral outcomes and the omission of any constitutional mandate for federal judicial intervention suggests the inadvisability of permitting a § 1983 or civil RICO action to confer upon federal judges and juries "a piece of the political action," no matter what relief is sought. Consideration of the various ways in which these other bodies have regulated and monitored the integrity of elections only confirms our hesitation to consider the disputed details of political contests.

Those with primary responsibility have not abandoned their duty to ensure the reliability and fairness of democratic elections. The House of Representatives, for example, has developed a body of guiding precedent regarding election contests, *see* 2 *Deschler's Precedents of the United States House of Representatives*, 323-888 (1977), and has enacted detailed procedures designed to ensure

due process and just consideration of disputes. *See* Federal Contested Elections Act, 2 U.S.C. §§ 382-396. The operation of these procedures was illustrated recently in the review of a close election contest for the House of Representatives in Indiana. *See generally* H. R. Rep. No. 58, 99th Cong., 1st Sess. (1985). The partisan and acrimonious nature of that debate only reaffirms the wisdom of avoiding judicial embroilment and of leaving disputed political outcomes to the legislative branch. *See McIntyre v. Fallahay,* 766 F.2d 1078 (7th Cir. 1985). Had the framers wished the federal judiciary to umpire election contests, they could have so provided. Instead, they reposed primary trust in popular representatives and in political correctives.

Dissatisfied candidates for office in West Virginia are also presented with numerous avenues by which to challenge election results, some of which parallel the federal model. The legislature is directed by Art. 4, § 11 of the West Virginia Constitution "to prescribe the manner of conducting and making returns of elections, and of determining contested elections . . .," and has accordingly enacted procedures for ballot control and recounts, W. Va. Code §§ 3-6-6 to 3-6-9 and election contests, W. Va. Code §§ 3-7-1 to 3-7-9. Initially, of course, the election returns are counted and certified by a board of canvassers. W. Va. Code § 3-6-9. West Virginia courts have long exercised "election mandamus" powers by which they may "compel any election officer . . . to do and perform legally any duty herein required of him." W. Va. Code § 3-1-45. *See White v. Manchin,* 318 S.E.2d 470 (W. Va. 1984); *State ex rel. Booth v. Board of Ballot Commissioners,* 196 S.E.2d 299 (W.Va. 1972); *Marquis v. Thompson,* 196 S.E.2d 299 (W.Va. 1930). Appellant Underwood, in fact, attempted to employ this very procedure to compel a recount, but his writ was denied as untimely. *State ex rel. Underwood v. Silverstein,* 278 S.E.2d 886.

State and federal legislatures, moreover, are not concerned solely with election results, but have subjected the entire electoral process to increasing regulation. Congress has enacted complex and comprehensive statutes to regulate campaign financing, 2 U.S.C. §§ 431-42 in an effort to "protect the integrity of the political process," *California Medical Association v. FEC,* 617 F.2d 619 (9th Cir. 1980) (*en banc*), *aff'd,* 453 U.S. 182 (1981) and to prevent "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions. . . ." *Buckley v. Valeo,* 424 U.S. 1, 25 (1976) (*per curiam*). This system of regulation includes not only substantive constraints on campaign financing, *see e.g.,* 2 U.S.C. 441a, but also procedural mechanisms and an administrative body, the Federal Election Commission, responsible for implementing and enforcing federal election laws. *See,* 2 U.S.C. § 437c-438. West Virginia has likewise enacted legislation designed to control "political campaign contributions, receipts and expenditures of money, advertising, influence and control of employees, and other economic, political and social control factors incident to . . . elections." W. Va. Code § 3-8-1. *See* W. Va. Code §§ 3-8-1 to 3-8-13. Thus it seems fair to conclude that the demonstration of judicial restraint under 42 U.S.C. 1983 will not leave American elections unsupervised or unregulated.

Finally, both state and federal authorities have employed criminal penalties to halt direct intrusions on the election itself. Federal conspiracy laws such as 18 U.S.C. § 241 have been applied to those engaged in corruption of election procedures. *See also,* 18 U.S.C. § 594 (prohibiting intimidation of voters); 18 U.S.C. § 600 (prohibiting promise of employment or other benefit for political activity). Criminal sanctions are also available under West Virginia law for those found to have filed false returns, tampered with ballots, bought or sold votes, and

the like. *See,* W. Va. Code §§ 3-9-1 to 3-9-24. A state grand jury investigated the very allegations at issue here, and issued one indictment, which did not result in a conviction.

IV.

Though the presence of even exhaustive alternative remedies does not usually bar an action literally within § 1983 or other statutes, *Patsy v. Board of Regents,* 457 U.S. 496 (1982); *Monroe v. Pape,* 365 U.S. 167, 183 (1961), we are persuaded in this context that we must refrain from considering the particulars of a disputed election, especially in a suit for damages. To do otherwise would be to intrude on the role of the states and the Congress, to raise the possibility of inconsistent judgments concerning elections, to erode the finality of results, to give candidates incentives to bypass the procedures already established, to involve federal courts in the details of state-run elections, and to constitute the jury as well as the electorate as an arbiter of political outcomes. These costs, we believe, would come with very little benefit to the rights fundamentally at issue here — the rights of voters to fair exercise of their franchise. Instead, plaintiffs, who voluntarily entered the political fray, would stand to reap a post-election recovery that might salve feelings of rejection at the polls or help retire debts from the campaign but would bear very little relationship to the larger public interest in partisan debate and competition undeterred by prospects of a post-election suit for damages.

Plaintiffs' theories in this case illustrate the ways in which a lawsuit such as this could intrude on the role of states and Congress to conduct elections and adjudge results. In their complaint, plaintiffs allege damages including, *inter alia,* loss of income (salary from holding public office), earning capacity, time expended for election

purposes and various election expenses, as well as injury to reputation. These losses, of course, would have resulted from election defeat absent any conspiracy by defendants. Injury to reputation, for example, may inhere in any political loss where exposure of opposition blemishes has from the earliest days of the Republic been a part of the quest for public office. Loss of the public official's salary is, *ipso facto,* an element of each and every political defeat.

Thus, plaintiffs in order to recover damages must perforce rely on the theory that defendants' alleged conspiracy cost them an election they otherwise would have won. In presenting their case plaintiffs would essentially ask a jury to review the outcome of the election. As explained above, however, the task is reserved for states and legislatures, and though the jury's review would not directly impair their primary responsibility to adjudge elections, its re-examination of election results would be inconsistent with proper respect for the role of others whose job it is to canvass the returns and declare a prevailing party. This intrusion, moreover, would not be limited to that of a jury, for the judiciary itself would doubtless be asked to review the jury's judgment of the election in post-trial motions. Principles of separation of powers and federalism, therefore, dictate that both jury and court avoid this inquiry.

Just as the review of electoral results by judge or jury is inconsistent with proper respect for the role of states and Congress, so too the outcomes of these deliberations are potentially inconsistent with the results of the electoral process. Were plaintiffs successful in convincing the jury that they should have won the election or should receive an award of damages, the courts would enter a judgment at odds with the judgment of Congress and of West Virginia, which have seated the apparent victors in these elections. The difficulties inherent in such continuing assaults on political legitimacy would be obvious and

might impair the respect to which the enactments of those duly elected are entitled.

Closely related to the problem of inconsistent judgments is the need for finality in elections. Inconsistent judgments, of course, call into question the results of an election in a way that detracts from finality. Even without inconsistent judgments, suits asking federal courts to replay elections cast into limbo contests that should have been long since decided. This case is illustrative. The election at issue occurred in 1980. Plaintiffs did not even bring their suit until 1983, after plaintiff Hutchinson's term would have expired. Now, nearly six years after the election, the parties remain in court essentially to contest the integrity of the election. So long as such avenues are available to defeated candidates, the apparent finality of election outcomes will be illusory.

Maintenance of this action might also provide incentives to losing candidates to ignore the principal routes established to challenge an election and to proceed instead to have the election reviewed in federal courts in hopes of gaining monetary compensation. Plaintiffs in this case, for example, made incomplete use of state and federal procedures yet still seek to recover millions of dollars in this action. Underwood pursued his efforts to secure a recount in an untimely fashion; though Hutchinson filed a complaint with the United States Attorney, there is no evidence that he pursued other avenues available to contest the election; Reese apparently made no attempts to employ available procedures. To allow these plaintiffs access to the federal courts would undermine the processes that are intended to serve as the primary routes to election control: "federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a section

1983 gloss." *Gamza v. Aguirre,* 619 F.2d 449 (5th Cir. 1980).

We further believe that federal courts are ill-equipped to monitor the details of elections and resolve factual disputes born of the political process. As one court has noted, "were we to embrace plaintiffs' theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, election cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law." *Powell v. Power,* 436 F.2d 84, 86 (2d Cir. 1970). Elections are, regrettably, not always free from error. Voting machines malfunction, registrars fail to follow instructions, absentee ballots are improperly administered, poll workers become over-zealous, and defeated candidates are, perhaps understandably, inclined to view these multifarious opportunities for human error in a less than charitable light. Quite apart from the serious problems of federalism and separation of powers problems raised by these tasks, we find sifting the minutae of post-election accusations better suited to the factual review at the administrative and legislative level, where an awareness of the vagaries of politics informs the judgment of those called upon to review the irregularities that are inevitable in elections staffed largely by volunteers. *See Hennings v. Grafton,* 523 F.2d 861, 865 (7th Cir. 1975).

To ask a jury to undertake such tasks, moreover, is to risk the intrusion of political partisanship into the courtroom, where it has no place. From the exercise of jury strikes to the final rendering of verdict, the spectre of partisanship would intrude and color court proceedings. Such disputes belong, and have been placed, in the political arena, and we cannot accept the substitution of the civil jury for the larger, more diverse, and more

representative political electorate that goes to the polls on the day of the election.

These concerns suggest that the federal judiciary should proceed with great caution when asked to consider disputed elections, and have caused many courts to decline the requests to intervene except in extraordinary circumstances. The unique nature of this case convinces us that the requested intervention is inappropriate under any circumstances, for plaintiffs' suit for damages strikes us as an inapt means of overseeing the political process. It would provide not so much a correction of electoral ills as a potential windfall to plaintiffs and political advantage through publicity. *See McIntyre v. Fallahay,* 766 F.2d at 1087. Those who enter the political fray know the potential risks of their enterprise. If they are defeated by trickery or fraud, they can and should expect the established mechanisms of review — both civil and criminal — to address their grievances, and to take action to insure legitimate electoral results. In this way, they advance the fundamental goal of the electoral process — to determine the will of the people — while also protecting their own interest in the electoral result. A suit for damages, by contrast, may result principally in financial gain for the candidate. We can imagine no scenario in which this gain is the appropriate result of the decision to pursue elected office, and we can find no other case in which a defeated candidate has won such compensation. Nor do we believe, in light of the multitude of alternative remedies, that such a remedy is necessary either to deter misconduct or to provide incentives for enforcement of election laws.

V.

We accordingly hold that federal courts do not sit to award post-election damages to defeated candidates. Equitable relief, though theoretically available, has

properly been called a "[d]rastic, if not staggering" intrusion of the federal courts, and "therefore a form of relief guardedly exercised." *Bell v. Southwell*, 376 F.2d at 662. Courts have therefore repeatedly refused to intervene in routine election disputes, acting instead only in instances of "patent and fundamental unfairness" that "erode the democratic process." *Hendon*, 710 F.2d at 182. Thus, in *Ury v. Santee*, 303 F. Supp. 119, 124 (N.D. Ill. 1969), the court invalidated an election in which "hundreds of voters were effectively deprived of their right to vote" when drastic reduction in the number of precincts rendered polling places so crowded as to be inaccessable. *See also Smith v. Cherry*, 489 F.2d 1098, 1102 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974) (offering of sham candidate "clearly debased the rights of all voters in the election").

In short, the general attitude of courts asked to consider election disputes, whatever the relief sought, has been one of great caution. Intervention has come only in rare and extraordinary circumstances, for courts have recognized and respected the delegation of such disputes to other authorities. Such intervention, moreover, has never included the grant to defeated candiates of monetary compensation. Because such compensation is fundamentally inappropriate, we hold that it is unavailable as a form of post-election relief. The parties here have asked for nothing more, and we need not consider under what circumstances equitable remedies might be appropriate. Accordingly, the judgment of the district court dismissing this lawsuit is hereby

AFFIRMED.

86-962

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN HUTCHINSON, ET AL.,

Petitioners,

v.

MARGARET MILLER, ET AL.,

Respondents.

TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTARY APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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United States Court of Appeals
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Filed
9/5/86

No. 85-1548

John Hutchinson, et al.,
Appellants,

versus

Margaret D. Miller, etc., et al.,
Appellees,

and

Cherrie Lloyd,
Defendant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston.
Charles H. Haden, II, District Judge

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson, with the concurrence of Judge Phillips and Judge Gordon, Senior United States District Judge, sitting by designation.

For the Court,

JOHN M. GREACEN,
Clerk.

In The
United States District Court for the
Southern District of West Virginia

Filed
7/19/86

Civil Action No. 83-2108
VOLUME XIV

John Hutchinson, et al., Plaintiffs,

v.

Margaret D. Miller, et al., Defendants,

Charleston, WV

May 2, 1982

Before: The Honorable Charles H. Haden, II, Judge

THE COURT: All right.

Thank you.

First, I would like to thank counsel. I think you at this point in the case have presented very excellent arguments and have analyzed the situation that brings us here at this time to consider whether or not this case shall proceed and go to a jury.

I appreciate the comments of counsel on both sides.

The matter before the court now is whether or not the case should go forward and defense or some defendants put on their side of the case or whether the Court as a matter of law should take this case from the jury and enter a judgment for some or all of the defendants.

The causes of actions that have been alluded to here in this case, the third amended complaint is made up of three counts; the three counts all sound in conspiracy, and thus obviously everyone is putting their attention to the question of whether or not conspiracy has been proven by a preponderance of the evidence in this case and whether the elements of a conspiracy have been sufficiently proven to allow this case to go further.

Count number three, the so-called RICO count, is the count in which the defendants are alleged to be members of an enterprise to do an unlawful act under the

requirements of that statute, which would require the proof of at least two violations of federal law. Again, it is found under 18 United States Code, Section 1962(d) and in a conspiracy charge.

I would agree with defense counsel in this case that there has been absolutely no proof in this case that would allow the Court to consider the RICO count of the complaint, which is count number three of the complaint, and I strike it from the evidence of the case and judgment will be entered for the defendants in the case.

As to count number one, count number one is the other count that gives this Court jurisdiction to hear the controversy that comes before it. It is a count sounding in an allegation of deprivation of constitutional rights of the three plaintiffs in this case, and it, too, alleges a conspiracy under the civil rights statute enacted by Congress shortly after the adoption of the 14th Amendment post the civil war, 42 United States Code, Section 1983, with allusions also made to Section 1985(3).

Both of these sound in a conspiracy, and it is necessary in a case like this that the plaintiffs prove that they have been deprived of a constitutional right recognized under the federal constitution and laws before they would have a federal cause of action.

In addition to that, the plaintiffs have pled a companion charge which is a West Virginia common law conspiracy, and that charge is only in this court and is only given consideration by this Court in the event that a federal cause of action is sustained, and it gives the plaintiff opportunity to recover either under a West Virginia cause of action and one or more federal causes of action. So with that in mind, the Court proceeds further on this.

It is also obvious in this case from the allegations, from the proof offered in damages in this case by the plaintiffs

that the plaintiffs here assert in this court not as voters disenfranchised of a particular right but as persons who occupy a special particular category, that is, as persons who were candidates for election and who alleged that their property right as to an office that they lawfully won has been unconstitutionally taken from them by reason of this civil rights conspiracy. So they sue as a defeated or disenfranchised candidate rather than as a disenfranchised voter.

Now, it has been mentioned early on in the case and there has been some controversy as to whether or not the burden of proof in this case when fraud is charged in this case is to the standard recognized in West Virginia as clear and convincing, which is a high standard of proof, or whether it is to a standard recognized in civil cases generally by a preponderance of the evidence.

Now, focusing on the federal cause of action, 42 United States Code, Section 1983 and 1985(3), that federal cause of action, the Court holds that it is compelled to judge this case on the lesser standard of whether the plaintiffs can prove their case by a preponderance of the evidence, and that that is the federal standard and the controlling standard.

On the other hand, as to West Virginia common law conspiracy, such as it directly involves proof of fraud, the standard would be under West Virginia law clear and convincing.

Now, as has been conceded by defense counsel in this case, at this point the Court must look to the evidence that was presented in this case and resolve every inference in the evidence that can be reasonably drawn from the evidence favorable to the plaintiffs' side of the case before making any determination that the plaintiffs have failed to prove their case. The Federal Rules of Civil Procedure so require it, and the Court proceeds on that basis.

The Court adds also one other evidentiary rule which is quite important in a case like this involving public officials, and that is that public officials are presumed to discharge their duties properly and lawfully, and that is a mere presumption in the law and it can be overcome by the evidence in this case by a preponderance of the evidence, if such is offered.

But on points where the evidence is silent as to whether or not a public official discharged his or her responsibilities lawfully and properly, and no evidence has been offered to contradict it, then, of course, the presumption would carry today.

Now, with that in mind, the Court is to make an analysis here of whether or not the plaintiff basically has proved a case under 42 United States Code, Section 1983 and established a conspiracy sufficient by a preponderance of the evidence at this point and sufficient to take this case to a jury and let the case proceed.

Now, in order to prove a conspiracy under the civil rights law, it is necessary that there be state action involved. Obviously, the defendants or several of the defendants in this case are public officials or public employees, and the others who are not such are alleged to be acting in concert with them. So the state action requirement of the civil rights law is satisfied.

Likewise, the defendants who were public employees or public officials were acting under color of law, so a cause of action is stated. The question is whether or not now the defendants in concert deprived the plaintiffs of a constitutional right.

I have identified the constitutional right that the plaintiffs say is involved.

And secondly, whether that was done intentionally.

Now, as to the proof of the conspiracy, there are four things that must be proven to satisfy a conspiracy, and each must be proved.

And that is, first, the agreement between two or more persons to accomplish an unlawful object or to accomplish a lawful object in an unlawful manner.

Secondly, that the object itself be identified.

Thirdly, that in pursuant of the execution of that conspiracy that one or more overt acts occur, and that means simply that something be done in furtherance or an act be done to bring about the success of the conspiracy.

And finally, that the plaintiffs suffer actual harm or actual damages.

Now, throughout this case, from the standpoint of first the pleading and then proof at this trial, there has been a great difficulty in asserting the plaintiffs' case.

As Mr. Winter said, the judge who handled this case before this judge did, that is, Judge Copenhaver, and before it was transferred to this Court, had occasion to pass upon many of the pleading aspects of the case.

Judge Copenhaver held that the case was only minimally sufficient to survive motions to dismiss as to whether or not a cause of action was stated in any one of three of the matters contained in the complaint.

Then when we get to this point in the trial, you have to go further, and it is whether or not a cause of action was stated and here proven sufficient to take this case to the jury.

Now, a basic problem in this case throughout has been what was the alleged conspiracy.

A second basic problem has been what harm, if any, assuming the existence of the conspiracy, has been proven by the plaintiffs.

As the evidence in this case progressed, and dissimilar to the pleading in this case, it became apparent that part of the conspiracy that the plaintiffs allege, that is, CES's and the county commission's and the county clerk's alleged involvement in the purchase of the CES electronic system in 1978 and 1979 was not a part of any conspiracy in this case.

It was originally asserted to the Court that the conspiracy was that the county clerk would convince the county commission to purchase an electronic voting system in 1978 in order to have at hand a system that would be sufficient to manipulate and rig an election to be held in 1980, thus resulting in the alleged outcome which has been asserted in this case.

And, of course, some evidence was adduced at some early period during the trial of this case and then the county commissioners were voluntarily dismissed out of the case at that time. And that part of the alleged conspiracy was abandoned.

From that point forward, the evidence in this case has focused on what occurred in that period of time immediately before the general election of 1980 beginning somewhere around October 17th with the time of the testing of the electronic voting system for the general election and then concluding again on the night that the unofficial results were tabulated or what is known in common parlance as election day on November 4th and into the early hours of November 5th and then commencing again with our attention to what occurred at the canvass commencing on November 10th but actually beginning in earnest on November 17, 1980, and then, of

course, the alleged matters that occurred in between the night of the general election and the canvass of November 17th.

Now, it has been suggested strongly by defense counsel in this case, and the Court agrees it is true, that if the proof of a conspiracy fails in this case every aspect of the cause of action and every defendant in this case is exonerated by reason of the passage of the statute of limitations.

The causes of action asserted in this case are controlled by a two-year statute of limitation. The statute of limitation begins to run when the plaintiffs discover an alleged harm or injury and thus are put on notice that they have a right to do something to remedy that harm or injury.

The evidence is clear in this case that the discovery of the alleged harm or injury occurred as early as November 6 or 7, 1980, and as late as December 8 or 10, 1980, when Mr. Underwood initiated his cause of action questioning the method employed in the recount and questioning the outcome of the canvass insofar as his race was concerned.

And as counsel are well aware, the only date that keeps this case alive in this court is the alleged last act of the conspiracy which was supposed to have occurred sometime on or about February 8, 1981; and this action was brought in February 1983, and so if that is the last act of the conspiracy, that would be sufficient to keep this cause of action alive in this court.

So again we go back to the basis of whether or not a conspiracy has been proven in this case sufficient to withstand the motion for directed verdict.

Now, plaintiff counsel suggests to me, as he has urged throughout this case, that, judge, the law should be

molded to accommodate a situation where proof is difficult if not impossible to produce.

Well, I would suggest to plaintiffs' counsel that the law can accommodate that if legislatures choose to make it so or if an appellate court determines that the law is different than what we have apprehended it to be on prior occasions.

But a federal district court is a trial court, and a federal district court is compelled to follow the law as it has been decided by the appellate courts and enacted by, in this case, the United States Congress, and where applicable by the West Virginia Legislature, and this Court recognizes its obligation and function.

Now, the leading case on civil conspiracy is the case that by now all counsel have made reference to, and that is the *Halberstam v. Welch* case, 705 Fed. 2d at page 472 (D.C. Cir. 1983).

Another case of significance is the case referred to both by Mr. Mitchell in his closing arguments and also by Mr. Wood, and that is *Hampton v. Hanrahan,* 600 Fed. 2d 600, (7th Cir. 1979), and what those cases stand for.

Now, in each of those cases, and in the *Halberstam* case, particularly, which the Court gives greater weight to because it is a very thorough analysis of the problem, the Court says there that under certain circumstances the existence of the conspiracy may be inferred from the association of the parties, from the alleged harm, from some of the overt acts.

But there is an important distinction in that case and in the other cases that have been cited to me from the fact situation that we have here in this case.

In the fact situation in the *Halberstam* case, the object of the conspiracy occurred and it was clear and precise that it

had occurred because it was a situation arising out of a robbery of a prominent person living in the Washington area which resulted in the killing and death of that prominent person. The robber was found to be a person who had been an accomplished burglar over quite a period of years and one who had accumulated a great amount of wealth over a period of time.

The interesting aspect which made this a civil conspiracy case was that he had chosen to live in with a companion over a period of years, and she was alleged in the civil conspiracy in a wrongful death action brought by the widow of the deceased criminal victim to be a co-conspirator with the robber in the criminal conspiracy of accomplishing burglaries which among other things resulted in injury and violence.

And that whole case had to do with whether or not the live-in companion could be held liable with the robber for the loss occasioned by the death of the deceased victim to compensate his estate.

Clearly, in that case and clearly in the other cases cited in the *Halberstam* case, the injury and the object of the conspiracy was known and apparent, and then the question was did certain persons cause that injury and damage.

That is a far different situation than we have facing us here because here we have an officially certified election officially certified on some time in December 1980 which reflected clearly and precisely that the three plaintiffs in this case lost this election. And in the instance of two of the three plaintiffs the loss was very significant, very large.

In the instance of one of the plaintiffs, one of the plaintiffs was counted out, so to speak, in the canvass which occurred after the unofficial results were available.

I think he was several votes ahead on the night of the unofficial results, and when the challenges and the absentees and the mutilated ballots were allowed or disallowed by the canvass he came up seven votes short, and assumed 14th place in a 13-man race for House of Delegates.

In the other instance, the evidence offered here would only substantiate that the plaintiffs clearly lost the election and that the result of the election was none other than a lawful, certifiable result of an election.

In that regard, the quality of the evidence that has been presented in this case has referred only to the precincts in the First District of Kanawha County, and this has very much significance to the Court. Those are several significant precincts, obviously, and as any precinct is in any county, but there are 274 precincts in Kanawha County, and these are few in number compared to the entire county; there are four other districts.

No evidence, no verbal evidence was offered at any time during the course of this election, no evidence except this large exhibit showing the results of the canvass, would reflect what happen in the other four districts of Kanawha County.

Likewise, in the plaintiff Mr. Hutchinson's race, no evidence is reflected in this case as to what happened in the other 12 or 13 counties which comprise the third congressional district.

So we focus this entire case as to whether or not something went wrong in one aspect or in several precincts of the First District and whether the election could have been won if the First District outcome had been different.

Well, that ignores a burden that is placed on the plaintiffs in this case. As Mr. Winter points out in this case, this cause of action is not actionable if all that is involved are mere election irregularities. This cause of action is actionable from a constitutional standpoint if the plaintiffs can produce evidence to show that the election as conducted was fundamentally unfair, and that would involve a constitutional right aside and apart from the citation of the 1943 U.S. Supreme Court case in *Snowden*.

And if the plaintiffs had been able to prove to this Court's satisfaction that the election involved was fundamentally unfair or would be able to at a later time prove to the jury, there would be no question that they would have met their burden insofar as satisfying the constitutional right.

But as has been variously suggested in this case, and we will get back to what was the agreement about, it has been stated broadly it was to rig the 1980 election.

And I have analyzed this evidence from every aspect that I can, and I find that the only evidence that the 1980 election was rigged is purely speculative in nature, it was mere suspicion; and it does not form the basis for the Court to draw a reasonable inference favoring the plaintiffs in this case to infer as *Halberstam* would allow under only certain circumstances to infer that a conspiracy may be present and that certain persons were a member of that conspiracy.

In that respect, as to the object of the conspiracy, one of the particular defendants in this case that has been charged in this case was the successful candidate in 1984 to the United States Congress, Mr. Staton, he was identified only by a plaintiff's counsel in this case as the object of a conspiracy.

That came as a surprise to the Court because as Mr. Mitchell and counsel in this case know, the object of a conspiracy does not make one thereby a conspirator, assuming the existence of a conspiracy, and that did not make one an unlawful participant or a co-conspirator.

Obviously, Mr. Staton would have to be dismissed from this case both from the standpoint of proof and from the standpoint of the assertions made by counsel as early as opening statement in this case.

But essentially what I am saying is that in analyzing all the evidence I find that the proof of the conspiracy in this case falls on two bases, and one basis as to all three plaintiffs in the case, and that is that the plaintiffs have never proven the existence of a conspiracy or these defendants' membership in a conspiracy.

They have never offered proof in this case which is required that there was a single plan, the essential nature and general scope of which was known to each person who is to be held responsible for its consequences.

Nowhere in this case has there been evidence offered that there was a single plan involved made known to each one of the defendants in this case. I might say this to particular defendants, Mr. Cline, representing the four persons who are employees of the county clerk, they are alleged to be guilty or conspirators in this case merely because they were employees and without their presence certain things in the alleged conspiracy could not have been done.

They were never charged nor has any evidence been offered that they were allegedly aware of any plan in this case other than the fact that they merely discharged duties.

Well, it is easy to recognize as black letter law to conspiracy that one does not become a conspirator by being a mere innocent participant in what is the alleged unlawful plan. One has to have knowing and willful intent to join in that conspiracy at some point during that conspiracy.

No evidence was offered as to those four defendants who are mere employees of the constitutional office of county clerk.

So keep that fact in mind.

The other second basis that this conspiracy falls for two of the three plaintiffs in this case is that Mr. Reese and Mr. Hutchinson offered no evidence in this case that they were harmed by the alleged actions in this case, and that is aside from offering what it cost them to run for office and what the office would have paid for the period of time that they would have occupied it had they won it.

They again did not offer evidence in this court which would have shown under any circumstances that they would have won that election unofficially on November 4, 1980, or at the canvass completion and certification of December 3, 1980. And that makes their case fatally defective. And the Court cannot infer a conspiracy when another of the basic elements of proof of the conspiracy is not satisfied.

Now, inference has been made in this case whether the plaintiffs would have had to show under certain circumstances as to the matter of harm that they would have won, in other words, that what they would have had to prove would be outcome changing. That would appear to be the rule of the *Donahue* case. There are two other cases saying whether or not there is substantial possibility that the outcome would be affected and another one on a sliding burden of proof.

It is apparent to the Court that where the conspiracy itself is not proven that the burden of showing that the outcome sought to be changed that falls on the plaintiffs is accordingly much higher because the Court or a jury would not be given reason to infer from either end of the conspiracy that one had occurred and that these people were members.

Consequently, all we have in this case are a series of unrelated acts that have been proven, most of which have a reasonable and an innocent appearance as easily as they would have a culpable appearance, none of which, in the Court's rulings throughout the presentation of the plaintiffs' case, are attributable to more than one individual or to more than one entity who have been identified as a defendant in this case.

And there are certain things that have been attributable to the defendants Miller, to the defendant CES, certain things attributable to Mr. Roark and the alleged Roark returns, and on those matters I want everyone to keep clearly in mind that these are not individual cases asserted against any one of these defendants but these are cases all alleging conspiracy and saying that all of these defendants joined together to accomplish an unlawful plan or to accomplish a lawful plan in an unlawful manner.

And that is where the proof has failed in this case, and the proof of individual overt acts, however compelling some few of them may appear to be to plaintiffs' counsel, does not suffice for the absence of proof of the conspiracy.

And considering all of these matters, the Court has no choice but to enter directed verdicts for the defendants in this case.

I do so with a great deal of reluctance, although I recognize that at some point in time the Court is obliged to

perform its duty in a case like this. I say I do this with some degree of reluctance because this involved on both sides of this case for the most part, and I am not deprecating Mr. Reese in any way, I just don't know him, and I don't know him to be a public official, but I do know Mr. Hutchinson and Mr. Underwood, and I know the other public officials who are involved in this room, and the public employees. They are respected public officials and have been for their discharge of their offices in the past.

And it is unfortunate, indeed, that this type of litigation has to come to the Court system, but it had to, and I had to be resolved. But the Court does so with an awareness and with a sensitivity to all of those things that are involved in being a candidate for office and being a losing candidate as well as a successful candidate for office at various times.

The Court is aware of the strains and the costs and all of those things that are involved, and the Court is aware and takes in absolute good faith by the persons who assert it that the persons who were and persons who are public servants do so with a view of discharging their duties honestly and properly and with a great deal of reverence for the constitutional system that we all operate under, and for observance of the federal and state laws.

So for all of those reasons, and as I said, because I know the parties, and because I can understand the situation, I find a case like this particularly difficult to handle.

But the Court has no choice but to enter the judgment in this case, and I do so, and will enter the judgment and will direct that the jury be charged.

Thank you, ladies and gentlemen.